Toffoloni v. LFP Publishing Group, LLC Doc. 75 Att.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI, as Administrarix and Personal Representative of the ESTATE OF NANCY E. BENOIT, Plaintiff,	)	
v.	)	CIVIL ACTION FILE NO. 1:08-CV-0421-TWT
LFP PUBLISHING GROUP, LLC, d/b/a Hustler Magazine, MARK SAMANSKY, an Individual, and other distributors and sellers of, Hustler Magazine, as Defendants X, Y, and Z, Defendants.	)	

BRIEF IN SUPPORT OF
PLAINTIFF'S MOTION TO COMPEL DISCOVERY RESPONSE

COMES NOW, Plaintiff, Maureen Toffoloni, as Administratrix and Personal Representative of the Estate of Nancy E. Benoit ("Plaintiff"), through counsel, and files this her Brief in Support Motion to Compel the Discovery Responses of Defendant LFP Publishing Group, LLC (herein "LFP" or "Defendant") with this Court as follows:

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INTRODUCTION

This case stems from LFP's unauthorized publication of nude and partially nude photographs of Nancy Benoit in its "March 2008" issue of *Hustler Magazine*. A cause of action for violation of the right of publicity was brought by Plaintiff, Nancy Benoit's mother, as representative of the Estate of Nancy Benoit. This Court granted Defendant's Motion to Dismiss on October 6, 2008, and Plaintiff appealed that ruling. On June 25, 2009, the Eleventh Circuit Court of Appeals reversed the judgement of the District Court, finding that Plaintiff had properly stated and proven a claim for violation of the right of publicity, and remanded the case for further proceedings.

On October 16, 2009, Plaintiff served upon Defendant her First Interrogatories and First Request for Production of Documents. On November 30, 2009, Defendant submitted its responses to Plaintiff's First Interrogatories and First Request for Production of Documents. Defendant objected to Interrogatories numbers 7, 8, and 9, and Requests to Produce numbers 2 through 7 relating to the financial condition of LFP and its parent companies, claiming that such Requests were not relevant and sought confidential information. In addition, Defendant objected to Interrogatory number 14 and Request to Produce number 8 concerning amounts paid to other models and actresses featured in its magazine.

Plaintiff submitted a letter to counsel for Defendant on December 9, 2009, detailing the reasons why Defendant was obligated to respond to those Interrogatories and Requests for Production of Documents. A copy of Plaintiff's counsel's letter is attached hereto as Exhibit A and incorporated herein by reference. This letter fulfilled Plaintiff's good faith duty to confer with opposing counsel to settle discovery disputes as required by Local Rule 37.1(A)(1) and Federal Rule of Civil Procedure 37(a)(1). Defendant responded with a letter dated December 16, 2009. A copy of Defendant's counsel's letter is attached hereto as Exhibit B and incorporated herein by reference. Since this exchange of letters, Plaintiff and Defendant have been unable to resolve their differences regarding Defendant's responses to Interrogatory number 14 and Request to Produce number 8. Plaintiff therefore brings this Motion to Compel a response from Defendant to Interrogatories numbers 7, 8, and 9, and Requests to Produce numbers 2 through 7.

OBJECTIONS

The following analysis will restate the Defendant's Objections and Plaintiff's responses:

Interrogatory No. 7 "For purposes of Plaintiff's claim for punitive damages, state the net worth of Defendant LFP Publishing Group, LLC for the years ending 2006, 2007, 2008, and 2009 to date."

Defendant objected to Interrogatory number 7, claiming that the request was irrelevant to any claim, defense, or issue in the case, not reasonably calculated to lead to the discovery of admissible evidence, and because it sought confidential, non-public financial information.

Defendant's basis for its objection is its claim that Plaintiff is not entitled to punitive damages, as such damages are only available in an invasion of right of publicity case where the improper use of images was premeditated, conscious, and deliberately continuing in nature, and therefore Plaintiff is not entitled to such documents relating to the financial position of Defendant. Defendant cited *Cabaniss v. Hipsley*, 114 Ga. App. 367, 151 S.E.2d 496 (1966), and claimed that Defendant, in good faith and in reliance on the advice of counsel, believed that the publication of the photos was not a violation of the right of publicity. Additionally, Defendant argued that Plaintiff, unlike here, had pled no such set of facts, and was therefore barred from seeking punitive damages.

Defendant also claimed in its Response that, even if punitive damages were properly pled, Plaintiff would nevertheless be barred from introducing evidence of Defendant's general financial status. (Citing Dimaso v. Ford Motor Co., 2003 WL 22850075 (Ga. Super. 2003) and State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 123 S. Ct. 1513 (2003). Plaintiff hereby addresses Defendant's objections.

A. Punitive Damages are Proper.

Defendant was fully aware at the time of publication that publishing nude photographs of Nancy Benoit was a clear violation of Plaintiff's right of publicity. Plaintiff's Motion for Temporary Restraining Order and accompanying Brief in Support, filed February 5, 2008, describes the law concerning the right of publicity, and why the publication of the pictures in question was a clear violation of those rights. Defendant displayed "willful misconduct" and "entire want of care which would raise the presumption of conscious indifference to consequences" by knowingly publishing the disputed photographs, though such publication was an obvious violation of the law. See O.C.G.A. § 51-12-5.1.

In addition, Plaintiff properly prayed specifically for punitive damages in her Verified Complaint, as required by O.C.G.A. § 51-12-5.1(d)(1). See Plaintiff's Complaint, ¶ 30. It is well-established law that a jury may award punitive damages in a right of publicity case. See Alonso v. Parfet, 253 Ga. 749, 750, 325 S.E.2d 152 (1985), where the court ruled that punitive damages may be awarded "to discourage the 'inverse condemnation' of a name."

Cabaniss v. Hipsley, 114 Ga. App. 367, 151 S.E.2d 496 (1966), cited by Defendant in support of its argument that punitive damages are not proper in this case, deals only with the *right of privacy*, and does not address Georgia's right of publicity laws. Id. at 370. In addition, Cabaniss dealt with mistaken identity in the production of disputed photographs, and as such, punitive damages were not authorized.

> Mere negligence on the part of officers or agents of defendant On The Town, Inc., in delivering plaintiff's photograph for publication instead of the photograph of the actual performer, would not justify an award of punitive damages. If, however, on another trial the jury should find that ... defendant's acts and conduct were ... premeditated, ... an award of punitive damages would be authorized.

Id. at 368.

In the case at hand, Defendant's publication was not negligent, but purposeful and willful, especially given Defendant's past experience in such matters as well as Plaintiff's warnings that the publication of such photographs is contrary to the law of the right to publicity. Therefore, this case is completely distinguishable from *Cabaniss*, and punitive damages are warranted.

B. Financial Documents are Both Discoverable and Relevant.

The second argument presented in Defendant's Response for refusing to respond to Interrogatory numbers 7, 8 and 9 and Requests for Production numbers 2 through 7 is that, even if punitive damages are proper, the Plaintiff is not entitled to discovery of Defendant's general financial status.

The law allows a great disparity between what is considered "discoverable material" and "admissible evidence." The scope of what constitutes discoverable material, which must be submitted in response to an interrogatory request absent privilege, is very broad and includes anything that is "reasonably calculated to lead to the discovery of admissible evidence," regardless of whether the submission of such material would be inadmissable at trial. *See* O.C.G.A. § 9-11-26. Plaintiff has not decided, at this time, to seek to submit documentation of Defendant's net worth as admissible evidence. Instead, Plaintiff seeks the requested material because it is, at the very least, reasonably calculated to lead to the discovery of admissible evidence for the purposes of determining general and punitive damages.

Courts traditionally construe discovery requests very broadly and in favor of the production of requested information and full disclosure. See Sechler Family Partnership v. Prime Group, Inc., 255 Ga. App. 854, 859567 S.E.2d 24 (2002), where the court, quoting Clayton County Bd. of Tax Assessors v. Lake Spivey Golf Club, Inc., 207 Ga. App. 693, 428 S.E.2d 687 (1993), found that "[t]he discovery procedure is to be given a liberal construction in favor of supplying a party with the facts without reference to whether the facts sought are admissible upon the trial of the action." In Sechler, the plaintiff requested discovery of documents detailing the financial status of third-party federal bank. The court found that the discovery request was calculated to lead to admissible evidence, even if the documents themselves were inadmissable, and that the confidentiality order entered by the court prevented any undue invasion of privacy. Id at 859.

In addition, such documentation of net worth and financial status may well constitute admissible evidence in a determination of actual, as well as, punitive damages. Punitive, or exemplary, damages are based upon the aggravated nature of a defendant's conduct and serve to punish the defendant and deter others from similar conduct. Carter v. Spells, 229 Ga. App. 441, 494 S.E.2d 279 (1997); Southeastern Sec. Ins. Co. v. Hotle, 222 Ga. App. 161, 473 S.E.2d 256 (1996). There are three guidelines set forth by the United States Supreme Court when determining the constitutionality of punitive damages: the degree of reprehensibility of the action; the ratio of the punitive award with the actual compensatory award; and the relationship of the punitive damage award with comparable civil penalties authorized in similar cases. See BMW of North America, Inc. v. Gore, 517 U.S. 559, 575, 116 S. Ct. 1589 (1996).

Defendant claims in its Responses to Interrogatories that "plaintiffs may not introduce evidence of defendant's net worth, wealth, or financial condition generally" (citing Dimaso v. Ford Motor Co., 2003 WL 22850075 (2003)). However, this is simply not the case. Evidence of a defendant's net worth or wealth may not overcome an otherwise unconstitutionally excessive award, however, such material may be properly considered when determining an award amount.

In his concurring opinion in BMW, Justice Breyer claims that the financial position of the defendant must be considered when determining a punitive damage award. "[A] fixed dollar award will punish a poor person more than a wealthy one," so that the wealth of the defendant must be taken into account when determining punitive damages. *BMW* at 591. Because one of the goals of punitive damages is to punish the defendant, the court must look to the financial status of the defendant to determine an amount that will adequately punish the defendant's conduct.

Defendant can have no concerns about the sensitive business nature of the material requested, because this Court has issued the Stipulated Protective Order Governing Confidential Material and Inadvertent Production of Privileged Information dated December 23, 2009. The Protective Order ensures that such material shall not be released to the public. It is clear that Plaintiff has a right to review such documentation, as it may lead to discoverable evidence, and it is relevant to the issue of punitive damages.

Interrogatory No. 8 "For purposes of Plaintiff's claim for punitive damages, state the net worth of LE Publishing, LLC for the years ending 2006, 2007, 2008, and 2009 to date."

Defendant objected to Interrogatory number 8, citing the arguments made in response to Interrogatory number 7, with the additional argument that LE Publishing, LLC is a non-party, and a separate and distinct legal entity from Defendant.

Plaintiff hereby incorporates the arguments set forth in her response to Defendant's objection to Interrogatory number 7.

Interrogatory No. 9 "For purposes of Plaintiff's claim for punitive damages, state the net worth of L.F.P., Inc. for the years ending 2006, 2007, 2008, and 2009 to date."

Defendant objected to Interrogatory number 9, citing the arguments made in response to Interrogatory number 7, with the additional argument that L.F.P. Inc. is a non-party, and a separate and distinct legal entity from Defendant.

Plaintiff hereby incorporates the arguments set forth in her response to Defendant's objection to Interrogatory number 7.

Request for Production of Documents No. 2 "Profit and loss and/or operating statements for LFP Publishing Group, LLC for each month in calendar years 2006, 2007, 2008, and 2009 to date."

Defendant objected to Request for Production of Documents number 2, citing the arguments presented in its response to Interrogatory number 7.

Plaintiff hereby incorporates the arguments set forth in her response to Defendant's objection to Interrogatory number 7.

Request for Production of Documents No. 3 - "Profit and loss and/or operating statements for L.F.P., Inc. for each month in calendar years 2006, 2007, 2008, and 2009 to date."

Defendant objected to Request for Production of Documents number 3, citing the arguments made in response to Interrogatory number 7, with the additional argument that L.F.P., Inc. is a non-party, and a separate and distinct legal entity from Defendant.

Plaintiff hereby incorporates the arguments set forth in her response to Defendant's objection to Interrogatory number 7.

Request for Production of Documents No. 4 "Profit and loss and/or operating statements for LE Publishing Advisors, LLC for each month in calendar years 2006, 2007, 2008, and 2009 to date."

Defendant objected to Request for Production of Documents number 4, citing the arguments made in response to Interrogatory number 7, with the additional argument that LE Publishing Advisors, LLC is a non-party, and a separate and distinct legal entity from Defendant.

Plaintiff hereby incorporates the arguments set forth in her response to Defendant's objection to Interrogatory number 7.

Request for Production of Documents No. 5 "A statement of net worth or financial statement for LFP Publishing Group, LLC d/b/a "Hustler Magazine" for the years 2006, 2007, 2008, 2009, to date."

Defendant objected to Request for Production of Documents number 5, citing the arguments made in response to Interrogatory number 7.

Plaintiff hereby incorporates the arguments set forth in her response to Defendant's objection to Interrogatory number 7.

Request for Production of Documents No. 6 "A statement of net worth or financial statement for L.F.P., Inc. for the years 2006, 2007, 2008, 2009, to date."

Defendant objected to Request for Production of Documents number 6, citing the arguments made in response to Interrogatory number 7, with the additional argument that L.F.P., Inc. is a non-party, and a separate and distinct legal entity from Defendant.

Plaintiff hereby incorporates the arguments set forth in her response to Defendant's objection to Interrogatory number 7.

Request for Production of Documents No. 7 "A statement of net worth or financial statement for LE Publishing Advisors, LLC for the years 2006, 2007, 2008, 2009, to date."

Defendant objected to Request for Production of Documents number 7, citing the arguments made in response to Interrogatory number 7, with the additional argument that LE Publishing Advisors, LLC is a non-party, and a separate and distinct legal entity from Defendant.

Plaintiff hereby incorporates the arguments set forth in her response to Defendant's objection to Interrogatory number 7.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion to Compel should be GRANTED, and the requested information and documentation be forwarded to Plaintiff's counsel as soon as possible. In addition, Plaintiff asks that Defendant be directed to reimburse Plaintiff for attorneys' fees and other costs incurred in bringing this Motion.

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Respectfully submitted January 12, 2010.

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CERTIFICATE OF SERVICE

This is to certify that on January 12, 2010, I have electronically filed the foregoing Plaintiff's Motion to Compel Discovery Response and Brief in Support thereof with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorney(s) of record:

James Clifton Rawls, Esq.
S. Derek Bauer, Esq.
Barry J. Armstrong, Esq.
Darrell Jay Solomon, Esq.
Jeffrey F. Reina, Esq.
Paul J. Cambria, Esq.

And by placing a copy of same in the United States Mail in a properly addressed envelope with adequate postage thereon to:

William M. Feigenbaum, Esq.
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/s/ Richard P. Decker
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